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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/805,779	03/22/2004	John F. Joseph	03278.0236	9928
26712 7590 03/30/2009 HODGSON RUSS LLP THE GUARANTY BUILDING 140 PEARL STREET SUITE 100 BUFFALO, NY 14202-4040				
EXAMINER				
CHAWLA, JYOTI				
ART UNIT		PAPER NUMBER		
1794				
MAIL DATE		DELIVERY MODE		
03/30/2009		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of Allowability**Application No.**

10/805,779

Applicant(s)

JOSEPH ET AL.

Examiner

JYOTI CHAWLA

Art Unit

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address--

All claims being allowable, PROSECUTION ON THE MERITS IS (OR REMAINS) CLOSED in this application. If not included herewith (or previously mailed), a Notice of Allowance (PTOL-85) or other appropriate communication will be mailed in due course. **THIS NOTICE OF ALLOWABILITY IS NOT A GRANT OF PATENT RIGHTS.** This application is subject to withdrawal from issue at the initiative of the Office or upon petition by the applicant. See 37 CFR 1.313 and MPEP 1308.

1. ☒ This communication is responsive to RCE and amendment of 12/31/2008.
2. ☒ The allowed claim(s) is/are 1-6,8-10 and 14.
3. ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some* c) ☐ None of the:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this national stage application from the International Bureau (PCT Rule 17.2(a)).

* Certified copies not received: _____.

Applicant has THREE MONTHS FROM THE "MAILING DATE" of this communication to file a reply complying with the requirements noted below. Failure to timely comply will result in ABANDONMENT of this application.
THIS THREE-MONTH PERIOD IS NOT EXTENDABLE.

4. ☐ A SUBSTITUTE OATH OR DECLARATION must be submitted. Note the attached EXAMINER'S AMENDMENT or NOTICE OF INFORMAL PATENT APPLICATION (PTO-152) which gives reason(s) why the oath or declaration is deficient.
5. ☐ CORRECTED DRAWINGS (as "replacement sheets") must be submitted.
(a) ☐ including changes required by the Notice of Draftsperson's Patent Drawing Review (PTO-948) attached
1) ☐ hereto or 2) ☐ to Paper No./Mail Date _____.
(b) ☐ including changes required by the attached Examiner's Amendment / Comment or in the Office action of Paper No./Mail Date _____.
Identifying indicia such as the application number (see 37 CFR 1.84(c)) should be written on the drawings in the front (not the back) of each sheet. Replacement sheet(s) should be labeled as such in the header according to 37 CFR 1.121(d).
6. ☐ DEPOSIT OF and/or INFORMATION about the deposit of BIOLOGICAL MATERIAL must be submitted. Note the attached Examiner's comment regarding REQUIREMENT FOR THE DEPOSIT OF BIOLOGICAL MATERIAL.

Attachment(s)

1. ☐ Notice of References Cited (PTO-892)
2. ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
3. ☐ Information Disclosure Statements (PTO/SB/08),
Paper No./Mail Date _____
4. ☐ Examiner's Comment Regarding Requirement for Deposit of Biological Material
5. ☐ Notice of Informal Patent Application
6. ☐ Interview Summary (PTO-413),
Paper No./Mail Date _____
7. ☒ Examiner's Amendment/Comment
8. ☒ Examiner's Statement of Reasons for Allowance
9. ☐ Other _____.

/JENNIFER MCNEIL/
Supervisory Patent Examiner, Art Unit 1794

DETAILED ACTION

This supplemental action to the Notice of Allowance of 3/24/2009 provides a revised examiner's amendment, as shown below. Reasons of Allowance, as previously provided in the office action of 3/03/2009, are also provided below for clarity of prosecution.

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 12/31/2008 has been entered.

EXAMINER'S AMENDMENT

Applicant's submission filed on December 31, 2008 has been entered as compliant. Claim 1 and 8 have been amended and claims 7, 11-13 and 15-27 have been cancelled. Claims 1-6, 8-10, and 14 are allowed in the current application.

An examiner's amendment to the record appears below. Should the changes and/or additions be unacceptable to applicant, an amendment may be filed as provided by 37 CFR 1.312. To ensure consideration of such an amendment, it **MUST** be submitted no later than the payment of the issue fee.

Authorization for this examiner's amendment was given in a telephone interview with applicant's attorney Ranjana Kadle on 2/24/2009 and 3/23/2009

The application has been amended as follows:

In the claim:

Please cancel claims 16-27.

Please amend claim 1 to read as follows:

Claim 1 in line 4, replace "stearoyl" with -----stearoyl -----

Please amend claim 3 to read as follows:

Claim 3 in line 1, replace "3" with -----1-----

Reasons for Allowance

The following is an examiner's statement of reasons for allowance:

Non-Dairy whippable foods have been known in the art. However, a whippable food product comprising 30-40% triglyceridic fats, emulsifiers between 0.15 to 0.41%, proteins between 0.2 to 0.5% by weight and one or more hydrophilic colloids, wherein the emulsifiers comprise polysorbate 60 (0.02 to 0.05%), polysorbate 80 (0.02 to 0.05%), lecithin (0.06 to 0.2%) and sodium stearoyl lactylate (0.05 to 0.11%) which is pourable oil-in-water emulsion at refrigerated temperatures, however, the whipped composition behaves as a water-in-oil emulsion, i.e., undergoes phase inversion to make a non-greasy smooth texture and no waxy mouthfeel, which was not known at the time of the invention.

Closest prior art of record Lynch et al (US 6203841 B1) discloses of whippable food compositions comprising of about 31% triglyceridic fats (Column 20, lines 25-45) as instantly claimed. Lynch also teaches of 0.1 to 5% emulsifiers, such as, polysorbate 60, and polysorbitan mono and distearate which include Polysorbate 80 and sodium stearoyl lactylate and various combinations as instantly claimed (Column 9, line 15 to Column 10, line 5). Lynch also teaches of 0 -2% stabilizers and bulking agents and hydrophilic colloids (Column 9, lines 40-55) as instantly claimed. Lynch further teaches that the whippable composition that is smooth, non-greasy texture and free of waxy mouthfeel (Columns 10-12 and claim 26), however, Lynch does not teach or disclose

the types

and amounts of emulsifiers required by the present claims. Further, addition of emulsifier to Lynch does not result in a product with properties upon whipping with added sugar that are similar to properties of phase inversion claimed. In order to provide additional evidence, the applicants' submitted a 37 C.F.R. 1.132 Declaration on June 2, 2008 to provide evidence that the composition of column 20 of Lynch is not capable of inversion upon adding sugar. The affidavit was not commensurate in scope with the invention as claimed in June 08 but is relevant now as the applicant's have specified the ranges for each of the emulsifiers. The affidavit and figures 2(A) and 2(B) clearly show that the whippable composition of the invention as claimed is different from Lynch as the Lynch product disperses in water indicating that Lynch's product behaves as oil-in-water after whipping with sugar, whereas the invention as claimed remains intact in water even at 1 hour clearly showing that upon whipping the inventive composition undergoes inversion and behaves as water-in-oil composition as claimed. Therefore, one of ordinary skill in the art could not have expected or predicted the phase inversion in a product of Lynch by utilizing the claimed emulsifier amount. Thus, there is no teaching of a whippable food product which is pourable at refrigeration and room temperatures comprising by weight % about 30-40% triglyceridic fats , emulsifiers between 0.15 to 0.41%, comprising 0.02 to 0.05% polysorbate 60, 0.02 to 0.05% polysorbate 80, 0.06 to 0.2% lecithin, and 0.05 to 0.11% sodium stearoyl lactylate, one or more hydrophilic colloids and 0.2 to 0.5% proteins wherein the whipped confection has smooth, non-greasy texture, is free of waxy mouthfeel and has a butter-like taste, and wherein the whipped confection behaves as a oil-in-water emulsion, but if whipped with added sugar , behaves as a water-in-oil emulsion, which was not known at the time of the invention and the invention as claimed is free of prior art.

Any comments considered necessary by applicant must be submitted no later than the payment of the issue fee and, to avoid processing delays, should preferably accompany the issue fee. Such submissions should be clearly labeled "Comments on Statement of Reasons for Allowance."

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JYOTI CHAWLA whose telephone number is (571)272-8212. The examiner can normally be reached on 9:00 am to 5:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jennifer McNeil can be reached on (571) 272-1540. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/JC/
Examiner
Art Unit 1794

/JENNIFER MCNEIL/
Supervisory Patent Examiner, Art Unit 1794